



**Mathiu v Kiende (Civil Appeal E028 of 2024)  
[2026] KEHC 469 (KLR) (28 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E028 OF 2024  
SM GITHINJI, J  
JANUARY 28, 2026**

**BETWEEN**

**SIMON KINYUA MATHIU ..... APPELLANT**

**AND**

**MWITI MARY KIENDE ..... RESPONDENT**

*(An appeal from the Judgment/Decree of Hon. L.W Maina Muoti (R.M)  
in Meru Small Claims Court Case No. E474 of 2023 delivered on 7/2/2024)*

**JUDGMENT**

1. This Appeal arises from the Judgment of the learned Resident Magistrate Hon. L.W. Maina Muoti (R.M) delivered on 7.2.2024 in Meru Small Claims Court Case No. E474 of 2023, wherein the trial court entered judgment in favour of the Respondent herein at the sum of Ksh. 1,000,000 together with costs and interest.
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 27<sup>th</sup> February, 2024;
  1. The learned trial Magistrate erred in law and fact in awarding the huge amount of money in term of breach of contract which the applicant had no control over.
  2. The learned trial Magistrate erred in law and fact by failing to consider the appellant's evidence and the submissions of the appellant hence arriving at erroneous decision.
  3. The learned trial Magistrate erred in law and fact in awarding inordinately a large amount of money for breach of contract in excess on what was to be refunded which amounts to miscarriage of justice in the circumstances.



4. The learned trial Magistrate erred in law and fact for holding the appellant in breach of the contract without considering the fact that the sale agreement could not be executed due to the fact that the sold land was less than 0.046 Ha from the main land and could not pass through the land control board.
5. The learned trial Magistrate erred in law and fact by failing to consider the nature of the claimant and what constituted breach of the contract between two parties herein.
6. The learned trial Magistrate misdirected herself in law and fact by failing to consider that the court lacked jurisdiction to entertain the suit.
7. The Honourable court be pleased to allow the Appeal.
8. The Honorable Court do proceed to set aside the judgment and the appellant be allowed to refund only the money paid by the Respondent.
9. The cost of the subordinate Court and this appeal be awarded to the appellant herein.

### **Oral evidence**

3. CW1 Mary Mwiti, the Respondent herein, adopted her statement dated 18/1/2024 as her evidence in chief and produced the documents filed therewith as exhibits. She told the court that she and her husband Edward Gikundu sent money to the Appellant herein and his wife, Agnes Kinanu. They went to the property, but could not undertake subdivision thereof because the title deed was with Heros Sacco.
4. CW2 Francis Mwiti M'Mboroki, the Respondent's father told the court that he introduced the Respondent to the Appellant. He witnessed the execution of the agreement as well as the payment of Ksh. 350,000 by his daughter. The Respondent conducted a search which did not disclose any loan at Heros Sacco, and the Appellant used a copy of the title deed, but failed to disclose the previous loan.
5. CW3 Robert Kimathi, a pastor, adopted his statement dated 29/1/2024 as his evidence in chief. He told the court that he witnessed the execution of the agreement as well as the payment of Ksh. 200,000.
6. RW1 Simon Kinyua Mathiu, the Appellant herein, adopted his statement dated 26/1/2024 as his evidence in chief. He told the court that after the execution of the agreement, his wife, Kinanu Agnes, received only Ksh. 500. He acknowledged that the original title deed to the property was at Heros Sacco, which had sued him for failure to pay a loan, and he did not disclose that fact to the buyer.

### **Submissions**

7. The Appellant, through the firm of Ojwang Sombe & Co. Advocates, filed submissions dated 16/9/2025. Counsel submitted that the claim exceeded the jurisdictional purview of a small claims court, and cited *Esther Wamaitha Njihia & 2 Others v Safaricom Ltd* [2014] KEHC 6699 (KLR), *Samwel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 Others* (2012) eKLR, *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* (1989) E.A, *Wambua v Kimondiu & 3 Others* (Misc Application No. 087 of 2022) [2022] KEHC 10426 (KLR) and *Phoenix of E.A Assurance Company Ltd v S.M Thiga T/A Newspaper Service* (2019) eKLR. Counsel argued that the agreement was invalidated on account of lack of LCB Consent, and cited *Michael Mbogo Kibuti v Attorney General* (2020) eKLR, *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3, *Southern Engineering Company Ltd v Musingi Mutia* (1985) KLR 730 and *Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* (2014) eKLR. Counsel faulted the trial court for awarding costs to the party



that breached the contract instead of the aggrieved party, and prayed for the appeal to be allowed with costs.

8. The Respondent, through the firm of Kiautha Arithi & Co. Advocates filed submissions dated 22/9/2025. Counsel cited *Timsales Ltd v Wilson Libuywa* (2006) eKLR and *Selle v Associated Boat Co.* (1968) EA 123 on the duty of the first appellate court. Counsel contended that there was a breach of contract by the Appellant and cited *TS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] UKSC 14. Counsel asserted that it is a general rule that courts do not improve contracts made between parties, one which the parties have made for themselves, and cited *Ruto v Cheron* [2024] KEHC 10947 (KLR).

### **Analysis and Determination**

9. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
10. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held as follows: “This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
11. I have considered the appeal herein, the trial court’s judgment, which is the subject of this appeal, as well as the submissions by counsel.
12. From the grounds of appeal, the issues for determination are whether the damages were inordinately high and whether the Appellant’s evidence and submissions were considered.
13. Before delving into the merits of the appeal, the jurisdiction of the small claims court to entertain the matter has been raised.
14. Section 12 (3) of the *Small Claims Court Act* provides that, “The pecuniary jurisdiction of the Court shall be limited to one million shillings.”
15. Section 33 (1) of the Small Claims Act provides that, “The Court may award costs to the successful party in any proceedings.”
16. The Respondent pleaded in his statement of claim that, “By filing this Claim, I (the Claimant) hereby waive and forfeit the recovery of all sums in excess of Kshs 1,000,000, excluding costs and interests.”
17. The sum of Ksh. 1,000,000 awarded by trial court was within the jurisdictional purview of a small claims court. The court was equally justified in awarding costs and interest to the successful party, the Respondent herein.
18. Having gone over the jurisdiction hurdle, I will now determine whether the award of Ksh. 1,000,000 was excessive.
19. The Appellant had covenanted to give vacant possession of the land in question to the Respondent, free from any encumbrances upon transfer. Nonetheless, the transfer process could not be completed because the land was indeed encumbered, a fact which the Appellant willfully failed to disclose to the Respondent. The Appellant’s aforesaid conduct amounted to bad faith and constituted breach of clause 8 of the agreement for sale dated 2/12/2022, which stipulated that, “The vendor further confirm



- that the said parcel of land is not charged or placed as security and so there are no floating charges over the said parcel of land whatsoever.”
20. With the admitted breach of the agreement by the Appellant, the provisions of clause 12 of the agreement came into play, which provided that, “If any party breaches the terms and conditions of this agreement, the party in default shall be liable to pay the innocent party a sum of Kshs. 700,000/= (Seven Hundred Thousand Shillings Only) as liquidated damages and also refund all the expenses and costs which will have accrued to the innocent party for breach of this agreement. If the vendor default the same he shall further pay the purchaser all the costs he will have incurred in developing the said parcel of land thereof as per the current market value.”
  21. The Appellant is inviting the court to venture into the forbidden sphere of re-writing the agreement for sale dated 2/12/2022, which he voluntarily executed and consented to be bound by its terms.
  22. In Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR the Court of Appeal stated that: “We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503. The primary task of the court is to construe the contract and any terms implied in it. See Megarry, J. in the case of Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41.”
  23. I find that the sum of Ksh. 1,000,000 was supported by the evidence led and thus properly awarded.
  24. The trial court is faulted for failing to consider the Appellant’s submissions and authorities. That fault is misconceived because submissions cannot take the place of pleadings, and their non-consideration cannot in itself be a basis to overturn a trial court’s decision. Moreover, the mere fact that the trial court was ultimately dissuaded by the submissions of the Appellant together with the authorities he cited does not imply that they were disregarded altogether.
  25. For the foregoing reasons, I find that the appeal is in want of merit and it is hereby dismissed with costs to the Respondent.

**DATED AND DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF JANUARY, 2026.**

**S.M. GITHINJI**

**JUDGE**

Appearances:

Miss Ochola for the Appellant

Ms. Mutema for the Respondent.

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